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## Sentence

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

V.

12 CR 626-06

KEVIN BURDEN,

Defendant.

New York, N.Y.  
September 30, 2014  
10:00 A.M.

Before:

HON. EDGARDO RAMOS,

District Judge

## APPEARANCES

PREET BHARARA

United States Attorney for the  
Southern District of New York

ANDREW BAUER

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LEE GINSBERG

AVRAHAM MOSKOWITZ

Attorneys for Defendant:

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1 (In open court; defendant present)

2 THE COURT: Please be seated.

3 United States v. Kevin Burden.

4 Could you please state your name for the record.

5 MR. BAUER: Andrew Bauer, for the government.

6 THE COURT: Mr. Bauer.

7 MR. GINSBERG: Good morning, your Honor, Lee Ginsberg  
8 and Avi Moskowitz, appearing for Mr. Burden.

9 THE DEFENDANT: Good morning, your Honor.

10 MR. GINSBERG: If I might, your Honor, I wanted to  
11 note Nancy Tricamo, who is our mitigation specialist who worked  
12 on the case is present in the courtroom.

13 THE COURT: Good morning to you all.

14 And good morning to you, Mr. Burden.

15 THE DEFENDANT: Good morning, sir.

16 THE COURT: This matter is on for sentencing.

17 And in preparation for today's proceedings, I have  
18 reviewed the presentence report dated April 25, 2014, prepared  
19 by probation officer Kisha Singleton, which includes a  
20 recommendation. I have also reviewed the letters from Mr.  
21 Burden's attorneys and mitigation specialist dated September  
22 19, 2014, and a supplemental letter from the mitigation  
23 specialist dated September 26, 2014.

24 I have not received a submission from the government,  
25 is that correct Mr. Bauer?

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1                   MR. BAUER: That's correct, your Honor. Since we  
2 expedited the sentencing, the government did not have an  
3 opportunity to put in a submission. What I did hand up to your  
4 Honor is a document that you are familiar with from the trial  
5 that happened last month. It is the transcript of the excerpts  
6 from the video between Mr. Burden and the cooperating witness  
7 Jamar Mallory. And I submit that in lieu of a formal  
8 submission.

9                   THE COURT: Very well. I am familiar with this  
10 document.

11                  Let me begin with you, Mr. Ginsberg. Have you  
12 received a copy of the presentence report and discussed it with  
13 your client?

14                  MR. BAUER: Yes, your Honor.

15                  THE COURT: And, Mr. Burden, did you receive a copy of  
16 the presentence report and discuss it with your attorney?

17                  THE DEFENDANT: Yes.

18                  THE COURT: Are there any objections to the report  
19 regarding its factual accuracy?

20                  MR. GINSBERG: No, your Honor.

21                  THE COURT: Very well. Although I am not required to  
22 impose a sentence within the guideline range, I am required to  
23 consider the guidelines in imposing sentence. And to do so, I  
24 need to make that calculation.

25                  Mr. Burden entered a plea of guilty to a superseding

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1 information charging him with a violation of 18 U.S.C.  
2 Section 924(h), providing a firearm to another with the  
3 knowledge that it would be used in connection with a crime of  
4 violence or a drug trafficking crime. That count carries a  
5 maximum term of imprisonment of 10 years.

6 The offense base offense level for Mr. Burden's  
7 offense is 43, pursuant to 2K2.1(c)(1)(B) of the U.S. Sentencing  
8 Guidelines because a victim was killed in connection with the  
9 offense under circumstances that would constitute murder under  
10 18 U.S.C. Section 1111.

11 From that, three levels are deducted because Mr.  
12 Burden pled guilty and accepted responsibility for the offense,  
13 and did so in a timely manner.

14 And, Mr. Bauer, is the government not objecting to an  
15 additional reduction of two levels?

16 MR. BAUER: On what grounds, your Honor?

17 THE COURT: On the ground that -- I guess the drug --  
18 well, those would only affect the drug trafficking offenses,  
19 correct?

20 MR. BAUER: Yes, your Honor.

21 THE COURT: That yields a total offense level of 40.  
22 And Mr. Burden is in criminal history category III and,  
23 therefore, is facing a guidelines sentence of 360 to life.  
24 However, because of the particular charge to which he pled  
25 guilty he is only looking at a maximum of 120 months, and that

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1 is the effective guideline range.

2 Is there any objection to that calculation, Mr.  
3 Ginsberg?

4 MR. GINSBERG: No, your Honor.

5 THE COURT: Mr. Bauer.

6 MR. BAUER: No, your Honor.

7 THE COURT: Does the government wish to be heard prior  
8 to sentence being imposed.

9 MR. BAUER: We do, your Honor.

10 Judge, I imagine that a lot of the conversation here  
11 today from defense counsel is gonna be about Mr. Burden's  
12 medical condition. And rightfully so. It seems incredibly  
13 serious and, in particular, it seems to have had a significant  
14 impact on Mr. Burden.

15 I can confirm for you that I have spoken to the MCC  
16 personnel that, because of the kidney infection that Mr. Burden  
17 is suffering from, because of the thrice weekly dialysis  
18 treatments that he has been forced to undergo, he -- I think it  
19 was about two weeks ago that he began refusing treatment and  
20 pulling the cords out of his arms.

21 So, certainly, the condition is serious, as well as  
22 how it is treating him -- or how it is affecting him  
23 psychologically and emotionally is very serious. All that  
24 said, your Honor, I don't want the medical conversation to  
25 swallow what we're doing here. We're here to sentence

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1 Mr. Burden for conduct, very serious criminal conduct that you,  
2 after sitting through the trial of three of his co-defendants  
3 are all too familiar with.

4 I handed up the excerpts of the recorded meeting  
5 between Kevin Burden and Jamar Mallory. It was played  
6 throughout trial on a couple of occasions. And defense counsel  
7 and Mr. Burden have had that tape now for a couple of years.  
8 It demonstrates, your Honor, as you know, just how serious and  
9 how involved Mr. Burden was in the criminal atmosphere in  
10 Newburgh.

11 There is one excerpt in which he talks all about what  
12 it's like, and why it's important to join the Newburgh Bloods,  
13 teaches you to have faith in yourself as a man, how to be a  
14 grown man. The powers that be just being Blood. It should be  
15 about being better.

16 He was, as you know, your Honor, Mr. Burden was a high  
17 ranking member of the Bloods. He hosted Blood meetings at his  
18 house at 261 Street. He also sold drugs on a number of  
19 occasions with the trial defendants out of that house on 261  
20 Street. 261 Street was a weed spot. They sold marijuana. But  
21 cooperating witnesses testified at trial that they saw him  
22 selling crack along with other trial defendants, including we  
23 heard, Tyrell Whittaker. And then, of course, there is his  
24 involvement with the guns. And much of the excerpts here  
25 relate to the chrome joint, the chrome gun that he had gotten

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1 the week before, and he was loaning out to L-1 to do this  
2 robbery. But, Judge, that evidence is before your Honor in  
3 great detail, so I won't belabor it too much. But I will point  
4 you to excerpt five, where he talks about having two other  
5 guns. Because he was beefing with the Jamaicans. It was a  
6 short excerpt. It said, remember, I told you I was beefing  
7 with Jamaicans and I had the guns with me at tall times, do you  
8 feel me? I keep two in the bookbag and two in my waste -- I'm  
9 sorry, that is four guns that he mentioned on that tape.

10 Mr. Burden was a highly-connected seriously-involved  
11 member of the bloods. And what that meant was this very, this  
12 very violence, the violence that, when he handed a gun to  
13 Tyrone Whittaker and Glenn Thomas, it was without dispute that  
14 he did not know that someone was going to die that night. We  
15 have never said that. It's frankly the reason why we allowed  
16 him to plead guilty to the 924(h) charge in recognition that he  
17 didn't know there was going to be a murder. But what he did  
18 know was that he was handing a gun to two violent individuals  
19 to go do a violent robbery in which it's not surprising that  
20 gunfire erupted. It is not surprising that people were shot.  
21 It is not surprising that somebody died. And that is about as  
22 serious conduct as you can get.

23 Judge, he has gotten an incredible benefit, frankly,  
24 by being able to plead guilty to the 924(h) charge. The proof  
25 was very strong against him. You saw it. And we could have

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1 very easily kept the line and told him he had to plead to the  
2 924(j), which his guidelines here would be life. There would  
3 be no statutory cap.

4                   But in our effort to be reasonable, and in an effort  
5 to reflect what we think Mr. Burden's conduct was, is he was  
6 just handing guns over because another member of the bloods  
7 asked him for it. We thought that the 10 year number was  
8 appropriate. Now you're faced with the additional information  
9 of his medical treatment. And I do not want to belittle it.  
10 But, what I will say, is that I've spoken to people in the BOP.  
11 And they have represented to me Mr. Burden will almost  
12 certainly be designated to a medical facility, either Devons or  
13 Butner. Those facilities are specifically designed to handle  
14 treatment that Mr. Burden needs. In fact, they were telling me  
15 about a kidney transplant that took place at, I think it was  
16 Butner, last year. I have no doubt that this MCC arrangement  
17 for his dialysis has been hard on him. It has been hard on the  
18 MCC, as well. They have a slightly different view as to how it  
19 has all happened, as compared to Mr. Ginsberg and Moskowitz's  
20 view. But they are, admittedly, not equipped to handle  
21 bringing Mr. Burden to dialysis three times a week. It has not  
22 been a good set-up. I have no quarrel with that.

23                   What I am suggesting, your Honor, is that when he gets  
24 to Butner, or when he gets to Devons, that will be a good  
25 set-up for him.

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1                   And in defense counsel's submission, they suggest that  
2 Mr. Burden knows of a place in Newburgh where he can start  
3 getting dialysis there. I don't know. So I won't speculate,  
4 except for to say I'm not sure if that is going to be any  
5 better than what he will get at a dedicated facility like  
6 Butner or Devons, where he will be there and be able to receive  
7 treatment on a regular basis, without the complexity of this  
8 transport that he has had to deal with since he has been at the  
9 MCC.

10                  THE COURT: Because I have only seen Mr. Ginsberg's  
11 letter, what is the MCC saying about the current situation, the  
12 current set-up.

13                  MR. BAUER: Well, they were the ones who had asked me  
14 to expedite the sentencing a couple of months ago, once they  
15 realized that this dialysis was necessary. And when I had  
16 attempted to do that, Mr. Burden -- Mr. Moskowitz and Mr.  
17 Ginsberg wanted to really understand what the medical condition  
18 was because, rightfully so, they wanted to present it to your  
19 Honor. So they wanted him out of the MCC for a couple of  
20 months, both for their benefit and for his.

21                  They have been very candid that this has not been an  
22 easy set-up for them, between the marshals having to do the  
23 transport, or the MCC doing the transport. It has been very  
24 difficult on them. And so they, when posed with the situation  
25 that we were last week when we were told that he was now

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1 refusing treatment and refusing the transport to the hospital,  
2 that is when we came up with the solution of just getting this  
3 on your calendar as quickly as possible. And that's why we're  
4 here today. But the MCC is very eager to have him transported  
5 and moved to a facility at Devons or Butner. So the one  
6 specific request, besides the guidelines of 120 months, your  
7 Honor, is that you enter the judgment, if it at all possible  
8 today, or as soon as practicable for your Honor. That way we  
9 can expedite his designation out of the MCC.

10 THE COURT: I don't have, before me, anything from a  
11 doctor concerning his current medical condition.

12 Have you spoken with medical personnel at MCC, Mr.  
13 Bauer?

14 MR. BAUER: No, I have not. I have spoken to the  
15 lawyers at MCC who have spoken to the doctors. So it's a bit  
16 of a game of phone tag, or telephone, sorry. But everything  
17 that they have told me is consistent with what is in Mr.  
18 Moskowitz' and Mr. Ginsberg's letters, as well Ms. Tricamo, I  
19 think, her letter as well. And that is that it is an  
20 incredibly serious kidney infection that requires dialysis and  
21 will ultimately require, or is likely require a transplant.

22 THE COURT: Okay. Thank you, Mr. Ginsberg. Or Mr.  
23 Moskowitz.

24 MR. GINSBERG: Thank you, your Honor.

25 There is a lot of different layers, I think, to this

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1 sentencing argument that I am making here this morning.

2 To begin with, I think it's fair to say that the  
3 government did justice when they offered the plea that they did  
4 to Mr. Burden. And I think Mr. Bauer recognizes that, today,  
5 notwithstanding the fact that the guidelines still point your  
6 Honor towards the murder guideline, so the numbers are very  
7 high. I think the government realized, early on in this case,  
8 the limitation of Mr. Burden's involvement and conduct. And so  
9 that's why they offered the plea which caps the sentence at 120  
10 months.

11 And I bring that up first for two reasons. One, I  
12 think it's a credit to the government that they recognized that  
13 and did that. Because, as your Honor knows, both from this  
14 part of your life and your prior history, that that is not  
15 always the case. It's not always recognized that way which  
16 makes it much more difficult at the time of sentence, because  
17 the range could be so wide that it's harder to focus in on what  
18 the right sentence is to do, when you are looking at a  
19 360 month possibility.

20 Secondly, I think it is important, because I think the  
21 focus should be on the 0 to 120 months. Notwithstanding the  
22 fact that the guidelines are what they are, that's where I  
23 believe we should be looking. Not just because there is a  
24 statutory cap, but because essentially the government said in  
25 making that plea offer, this is the range where we think an

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1 appropriate sentence can be meted out.

2 It's not only that Mr. Burden is now suffering from  
3 the medical condition that he has, he has a history which we  
4 presented to your Honor in our submission, with some  
5 documentation and with the letter, and the portions of  
6 Ms. Tricamo's earlier submission that she made to us in the  
7 death penalty phase, to demonstrate that his was not an easy  
8 life to begin with. That, frankly, not because of his own  
9 doing, and consistent with many other cases that we see in this  
10 courthouse, Mr. Burden was in a situation from his early  
11 childhood where he did not have the kind of support and  
12 guidance and love and protection of a family or parents that  
13 one would hope everybody would have in their life.

14 And for that reason, among others, he ended up in and  
15 out of institutions for most his young life, and through his  
16 teens. We didn't want to burden the Court with literally the  
17 two and a half or three boxes of records that we have from all  
18 of those facilities. But Mr. Moskowitz and I have those boxes  
19 in our office, and we read through those documents. And it  
20 suggests, if nothing else, how a person like Mr. Burden ends up  
21 in a situation like he was when he was arrested for this case,  
22 and for so many other conduct that is mentioned in the  
23 probation report that occurred before this case.

24 And as I'm sure you have heard many times, I'm not  
25 saying this to excuse the current conduct, but there is a

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1 history. There is a history that sets the framework for how it  
2 got to be like that. This is not an individual who was working  
3 for a hedge fund and making ten, twenty million dollars a year  
4 and decided to be greedy and make another \$20 million a year,  
5 and had everything in life that life can afford to that person,  
6 but it wasn't enough. We're talking about a very different  
7 situation. And I think that would have been the principle  
8 argument that we would have made, in addition to the 120 month  
9 cap, had the current medical situation not occurred.

10                   And we're not here today in a malpractice lawsuit.  
11                   And I'm not going to ask your Honor to make a determination as  
12                   to how this came to be. I can tell you, your Honor, as an  
13                   officer of the court, that when I first found out about the  
14                   current medical condition that Mr. Burden has, I immediately  
15                   took responsibility. Because I thought that it was something  
16                   that I didn't do, or Mr. Moskowitz didn't do, because we were  
17                   not paying enough attention to our client. Even though we knew  
18                   we had seen him regularly, and we had talked to him about all  
19                   of his issues, and we had Ms. Tricamo working with us. We got  
20                   his records, his whole history, his school records, spoken to  
21                   his family. I really had the sense of panic that I was at  
22                   fault and I missed something.

23                   Once we got the records from the facility and we had  
24                   the records independently reviewed by medical professionals, I  
25                   guess it was a small relief to me that at least I was not at

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1 fault. But it is not a relief to Mr. Burden as to how this  
2 occurred.

3 And, again, I'm going to say I don't want to point  
4 fingers, but what I will say, in this instance and more  
5 generically, is that I have had too many cases over the last  
6 number of years, where situations either like this or close to  
7 this, have occurred. And, in fact, coincidentally, I'm  
8 currently on trial before Judge Engelmeyer. And when I left  
9 the building the other day, I ran into -- not literally, but I  
10 saw Judge Sullivan on the street with his trial advocacy class.  
11 And I stopped him, because he is the liaison to the MCC and  
12 MDC. And I told him, as soon as I had enough time, I was going  
13 to send him a letter. Not just about Mr. Burden's case, but  
14 about two other cases that I currently have, where situations  
15 almost as acute as this, are going on. And in which no matter  
16 how many times I have raised it with the assistant -- and it's  
17 not their fault. And how many times they have called the  
18 facility, and they have spoken to the Legal Department, and we  
19 have had to raise it in court to a judge, these situations  
20 simply get out of hand. And it may be that the Bureau of  
21 Prisons medical facilities, outside of the immediate New York  
22 City area are better equipped to deal with situations like  
23 this. But it doesn't mean that people should end up in  
24 situations like this because local facilities don't have the  
25 capability, or desire, or whatever else it is that is missing,

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1 to be able to deal with situations before they become so acute  
2 that somebody's life is on the line.

3 Now, all of that speaks to, I hope, what an  
4 appropriate sentence is in this case. Certainly, I suppose,  
5 your Honor can take some comfort that if you sentence  
6 Mr. Burden to additional jail time, the treatment he will get  
7 at Lexington or Devons or some other place, will be better,  
8 because it has to be, than what was happening in the MCC. It  
9 was not only the medical treatment, however. And that's why we  
10 submitted, just the other day, the letter from Ms. Tricamo who  
11 may be one step removed from the partiality that we have, from  
12 the subjectiveness that Mr. Moskowitz and I have in this case.  
13 Because she visited with Mr. Burden at the hospital and spoke  
14 to people at the hospital, and was able to communicate on a  
15 different level after speaking to them and Mr. Burden, not only  
16 the medical treatment or lack thereof, but the psychological  
17 state that he was in, and the emotional treatment,  
18 psychological treatment that was being put upon him by others  
19 who don't understand that even if you're an inmate at a jail  
20 charged with a serious crime, it doesn't make you less of a  
21 human being, and you ought to be treated in the way that  
22 anybody else should be treated.

23 And as much as almost anything else, that has caused a  
24 profound psychological effect on Mr. Burden. Not only is he  
25 facing this chronic disease that may cause him to have dialysis

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1 forever, or kidney transplant, or shorten his life, he has to  
2 hear from other people and be treated from other people as if  
3 he is some kind of a pariah, which does nobody any good but, in  
4 fact, has occurred.

5 I don't know that putting him in jail to get medical  
6 treatment at a facility is going to specifically deter him from  
7 further criminal conduct, any more than the fact that he is  
8 going to have to go to a dialysis center two, three, four days  
9 a week, or maybe be admitted from time to time to a medical  
10 facility for constant treatment. If your Honor believes that  
11 that's not enough of a deterrent upon him from committing  
12 crime, and he also has to be locked up, you certainly have the  
13 authority to make that decision.

14 In terms of general deterrence -- and I just -- I want  
15 to speak to those two issues. Because it seems to me often  
16 that is where the decision comes down to. In terms of general  
17 deterrent, I don't think anybody in the public, or anybody who  
18 has considered committing a serious crime would say to  
19 themselves, Kevin Burden was only in jail for a couple of  
20 years, and he was released to spend the rest of his life on  
21 dialysis, so I'm going to go commit a crime, too, because I'm  
22 not going to get a serious jail sentence. I don't think the  
23 wrong message would be sent to the public or to the community  
24 if your Honor were to release Mr. Burden and allow him to have  
25 medical treatment and to be home with his family. And without

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1 being overly dramatic about that, we don't know how much longer  
2 he has to be either home with his family or in a medical  
3 facility. None of us here know where this is gonna lead, or  
4 whether if he needs a kidney transplant one is going to be  
5 available, or whether it will be accepted or rejected by his  
6 body. So I think when we talk about punishment, there are many  
7 forms of punishment. And I'm not sure what's worse, to be put  
8 back into jail for a period of time, or to have to live through  
9 what he has lived through, and will live through, for the rest  
10 of his life. And I take into consideration the crime that was  
11 committed here and what he did.

12 And I'm glad that your Honor was able to sit through  
13 the trial of this case, and knew about this transcript.  
14 Because I think it puts his role in the right perspective, as  
15 did the government's plea offer. And, frankly, as did this  
16 entire conversation which Mr. Moskowitz and I have reviewed  
17 many, many times, where he concedes that there were guns that  
18 were given to somebody but basically says he didn't know what  
19 they were going do. It was even in a Motion to Suppress  
20 submission to the Court. And the government has said here,  
21 today, he never -- he never knew. So that, I think, also  
22 limits it. Whether or not the fact that the day he made any of  
23 these statements, he was already high because he smoked  
24 marijuana, or got higher because the cooperating witness  
25 continued to pour him, I think it was whiskey from a bottle at

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1 the hotel to try to get him to say more things, which he  
2 didn't, because he kept saying I didn't -- I didn't know what  
3 was going to happen with that, even though he was asked. Maybe  
4 puts some more perspective that your Honor wouldn't have  
5 otherwise had if this was just a plea with no trial and the  
6 rest that your had not seen already about what who did what.

7 So having said all of that, I respectfully ask this  
8 Court to balance all of the equities here -- and there are very  
9 serious mitigating equities that almost never exist in cases  
10 like this. Sometimes they are. Sometimes they do. And  
11 sentence Mr. Burden to the time that he has already served in  
12 jail, which is not an insignificant amount of time. And to let  
13 him get the medical treatment that he needs, and be with his  
14 family, so at least he can have the comfort of being around  
15 people who care for him, and will support him, and won't make  
16 it even that much more difficult for him to live with his  
17 situation.

18 And I'm happy to answer any other questions. Mr.  
19 Moskowitz is here. Ms. Tricamo, who saw Mr. Burden at the  
20 hospital the other day, and Mr. Moskowitz saw him last night at  
21 the hospital, can address or answer any questions your Honor  
22 might have as to specific situations.

23 THE COURT: Can anyone give me some idea as to what  
24 his medical prognosis is?

25 MR. MOSKOWITZ: Your Honor, I spoke at length to

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1 Mr. Burden's doctors yesterday. As Mr. Ginsberg I think  
2 indicated, nobody can give a certain prediction as to what the  
3 course here is. What they said is, he will require dialysis at  
4 least three days a week for the rest of his life. He is a  
5 candidate, at some point, for a kidney transplant. And he is a  
6 young man. He is otherwise -- you know, assuming they can get  
7 this under control, he is otherwise healthy. Whether he would  
8 qualify, whether he would get one, that's you know the vagary  
9 of the list, your Honor, is probably as equally familiar as I  
10 am.

11 I can tell the Court, your Honor may know we had a  
12 little difficulty in arranging to get him here. I ran over  
13 there last night to help make the arrangements. Part of the  
14 issue was that he was scheduled for surgery as early as today  
15 to put in a permanent port so that the dialysis can be  
16 accomplished more easily. It is my hope, one of the things  
17 we -- well, depending on the sentence, Mr. Burden is scheduled  
18 either, hopefully through Court order or voluntarily, to return  
19 from here to Bellevue where they are waiting for him to readmit  
20 him. The surgery is obviously not going to take place today.  
21 But it could take place as early as tomorrow. And certainly no  
22 later than next week.

23 I have been assured, and Mr. Burden was assured, that  
24 if the Court were to release him and he went -- and he went  
25 back to Bellevue, that the fact that he is obviously at the

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1 moment uninsured would not be a problem, they are capable of  
2 taking him back in. They want to take him back. The doctors  
3 are very concerned about him. All of the arrangements that  
4 will be necessary for him to get in will be made upon his  
5 return, one way or another. So, I can't give you a long-term  
6 prognosis, because no doctor is going to tell you that. The  
7 course of this disease is unpredictable. All they can tell me  
8 is that he will require this treatment, or a transplant, for  
9 the rest of his life.

10 THE COURT: Any insight as to the source of the  
11 infection that caused this?

12 MR. MOSKOWITZ: I had conversations about that with  
13 the doctors. And we consulted an outside doctor before we made  
14 our submission. The precise etiology, because of the delay in  
15 treating the -- well, what I can tell you, is it's some sort of  
16 infection. What the doctors said to me was, because of the  
17 delay in treatment, they could not tell me whether it could  
18 have been arrested if it had been treated immediately.  
19 Sometimes with kidney disease if it is treated early, it can be  
20 stopped, or slowed down, so that he would not be in the  
21 condition he is in now. They wouldn't say to me, well, it  
22 would never have developed to that point. But they said with  
23 this type of disease, if you catch it early enough, if you  
24 treat it, you can sometimes, or often, arrest it so that you  
25 have 10 more years, or whatever more years, until you get to

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1 the point where you need dialysis. Because there was several  
2 months of delay, by the time he got to the hospital, there was  
3 no -- he required dialysis right away. So there was no  
4 treatment for it, short of the dialysis. Those are the facts.

5 THE COURT: Thank you.

6 MR. MOSKOWITZ: If I may, I do want to make one  
7 observation. Your Honor is looking at Mr. Burden and sees a  
8 young man who looks, for all intents and purposes, healthy. I  
9 think this is not the picture that I saw last night, I don't  
10 know, 15 hours ago or less. Mr. Burden, when I saw him, was  
11 hooked up to the dialysis machine. He looked frail. He was  
12 shaking. He has lost weight.

13 THE COURT: How long has he been on dialysis?

14 MR. MOSKOWITZ: What?

15 THE COURT: How long has he been on dialysis?

16 MR. MOSKOWITZ: Since I think the end of April, early  
17 May. I think he actually went into the hospital May 2, May 3,  
18 somewhere around there. And, it's not an easy process. It  
19 is -- how long are you on each time, a couple of hours?

20 THE DEFENDANT: Four hours.

21 MR. MOSKOWITZ: Four hours.

22 It's a four-hour treatment, three times a week, so.  
23 And that is so that he can move around. I mean when he went  
24 into the hospital, it was an emergency. This time it was an  
25 emergency. The dialysis allows him to have some semblance of

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1 normalcy for that interim period. But if he doesn't get it, he  
2 immediately gets sick and gets significantly weaker.

3 The diet is another issue that has been a constant  
4 problem for him.

5 THE COURT: What is the issue with the diet?

6 MR. MOSKOWITZ: The issue with the diet is he can't  
7 eat what they are giving him. It makes him sick?

8 THE COURT: Says who?

9 MR. MOSKOWITZ: It makes him sick. That is the simple  
10 answer. It's not, as in the hospital, he gets specific food  
11 for people with, you know, that are in his condition. The MCC  
12 does not have that capability. It's much more limited in terms  
13 of their selection for inmates. And the food that he was being  
14 given was making him sick. And so he stopped eating it, in  
15 large part.

16 THE COURT: Okay.

17 MR. MOSKOWITZ: So.

18 THE COURT: Thank you.

19 Mr. Burden, you have an absolute right to address the  
20 Court before I impose sentence. Is there anything that you  
21 wanted to say?

22 THE DEFENDANT: Yes.

23 THE COURT: Yes, sir. You can remain seated. Just  
24 speak clearly into the microphone, okay?

25 THE DEFENDANT: All right.

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1                   First, I would like to say good afternoon, your Honor.  
2 And, well, what I would like to say, before sentence, is that,  
3 yeah, I did, you know, plead guilty to the crime at hand. And  
4 I did have time, you know, because you don't -- people in life  
5 don't really get a chance to look at theirself from the outside  
6 point of view. And I got the chance to see how, you know,  
7 pathetic that video was, you know. How sorry I looked. And  
8 what everything was costing me. And I have a -- I had two  
9 years to figure out everything, and where everything was  
10 heading. And then for me to get sick, it puts me right exactly  
11 where -- you know, it puts me -- like it forces me on a track  
12 that I don't -- I don't -- I don't want to be on, but I have to  
13 be on. And it's like only thing I could think of is how long  
14 I'm going to have left, and how much time I'm going to get to  
15 spend with my peoples. Because there is never gonna be an  
16 exact prognosis or exact prediction on how anything would turn  
17 out, as far as the kidneys. And every single day I go to  
18 sleep, and I wake up, I thank God to be woken. Because at any  
19 given time, any given time, I could go into a state where it's  
20 the point of no return. At any given time, this could happen  
21 for me.

22                   Only thing dialysis does is keeps me alive. Just  
23 because I'm on dialysis, doesn't even mean that it's gonna work  
24 for me. Some weeks dialysis doesn't even work for me and I  
25 have to be hospitalized, because of my potassium level remains

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1 high, my cholesterol remains high. Just because I get  
2 dialysed, don't mean anything. And when -- that being said, it  
3 is like, I -- I -- I just -- I just want -- I just want  
4 somehow, some way, if -- if -- if that's gotta be the rest of  
5 my life, can I please have a chance to make things right. Can  
6 I please have a chance to make things right. If I don't have  
7 that much time. And if I get this kidney transplant and it  
8 doesn't work. And that time being, until then, can I please  
9 have a chance to right my wrongs, and get as far away from as  
10 who I used to be as possible. Please, your Honor.

11 Thank you for giving me the chance to speak.

12 THE COURT: Thank you, Mr. Burden.

13 And in deciding what sentence to impose, I have  
14 considered all of the factors set forth in Section 3553(a) of  
15 Title 18 of the U.S. Code including, as most directly relevant  
16 to this case, the nature and circumstances of the offense, and  
17 the history and characteristics of Mr. Burden.

18 I have considered the need for the conditions imposed  
19 to reflect the seriousness of the offense, to promote respect  
20 for the law, to provide a just punishment for the offense, and  
21 to afford adequate deterrence to the criminal conduct. To  
22 protect the public from further crimes on behalf of Mr. Burden.  
23 And to provide the defendant with needed medical care or other  
24 treatment in the most effective manner.

25 I have considered the need to avoid unwarranted

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1 sentence disparities among similarly-situated defendants.

2 And in light of all that, this remains an incredibly  
3 difficult sentence to impose. Obviously, it was a very serious  
4 crime, with tragic consequences. I presided over the trial of  
5 the three co-defendants and was able to see, through the  
6 testimony of the various cooperating witnesses, the environment  
7 in which Mr. Burden was raised. And I was struck by the truly  
8 disturbing lack of appreciation on the part of all of those  
9 young men -- and they were all teenagers, practically.

10 Mr. Burden included -- of the fragility and sanctity of human  
11 life, much less the danger that they exposed themselves to on a  
12 daily basis. Much less a lack of respect for the rule of law.

13 It truly was, as one of the defense lawyers put it in  
14 his opening statement to the jury, that the jury would have to  
15 enter another world in order to try to understand what it was  
16 that motivated these young men.

17 And, indeed, I was very struck by this testimony.  
18 There was testimony about Mr. Burden, himself, being shot in  
19 the leg by a friend, as a favor so as not to have to shoot  
20 Mr. Burden in the face, as the friend had been instructed to  
21 do.

22 Did I get that basically right, Mr. Bauer?

23 MR. BAUER: It was in the foot, your Honor. But, yes,  
24 it was in order to save -- the other -- the other people wanted  
25 to shoot Mr. Burden in the face. And so he said, no, I'll take

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1 care of it. And he shot him in the foot instead.

2 And that's what counts as being kind and generous in  
3 the Newburgh in which Mr. Burden grew up. To be sure, no one  
4 in this room should be terribly surprised that Mr. Burden came  
5 to live the life that he did, or should be terribly surprised  
6 that he would see the need, or the attraction of joining a gang  
7 like The Bloods.

8 He is a person about whom it can be fairly said that  
9 he barely had a chance in life. His father abandoned him. His  
10 mother was unable to care for him as a result of her  
11 addictions. And his grandmother, who was kind enough to bring  
12 him in, was overwhelmed by having to raise her daughter's  
13 children, and sought at times to have him put in a half-way  
14 house.

15 Mr. Burden suffered from a number of mental conditions  
16 that required medication and treatment, perhaps some of which  
17 he went without, and caused him to be hospitalized at least  
18 five times as a boy.

19 At the same time, the Court cannot overlook the  
20 immensity of the criminal conduct that Mr. Burden has admitted  
21 to. A man is dead. And Mr. Burden played a supporting role in  
22 his death. And I appreciate the comments of counsel, and the  
23 government, that Mr. Burden had no idea that that would be the  
24 result.

25 And the sentencing guidelines reserve the most serious

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1 sentences for cases such as this. And I also appreciate that  
2 Mr. Burden has been granted an extraordinary benefit already by  
3 being allowed to plead guilty to an offense that is limited to  
4 no more than 10 years of incarceration. I also consider that  
5 this is not the first time Mr. Burden has appeared before a  
6 Court. He does have a criminal history, which is not a  
7 terribly impressive criminal history, but a criminal history,  
8 nonetheless, that includes orders of protection that were put  
9 in place with respect to certain of his family members.

10 Finally, there is the fact of Mr. Burden's physical  
11 condition. I don't have a medical report from Mr. Burden's  
12 treating physician, so I have no idea of the seriousness of his  
13 current condition, and what the prognosis is.

14 I accept counsel's representation, because counsel is  
15 representing as an officer of the Court and because of the  
16 Court's general knowledge, that typically speaking when someone  
17 is caused to be on dialysis that is something that they don't  
18 get better from. Dialysis has to continue, or some other,  
19 something else has to happen, like a transplant. And certainly  
20 the fact that he is on dialysis suggests that his condition is  
21 very serious, indeed. And because of that, his incarceration  
22 will therefore be significantly more onerous than that of the  
23 average defendant.

24 With respect to the deterrent, I do believe that there  
25 is an argument to be made that general deterrence requires that

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1 Mr. Burden be made to serve some additional time in prison.

2 And, in any event, for all of those reasons, it is the  
3 judgment of the Court that Mr. Burden be sentenced, and be  
4 committed to the custody of the Bureau of Prisons for 48 months  
5 on the count of conviction. That will be followed by three  
6 years of supervised release. The conditions of supervised  
7 release in the presentence report will be adhered to; that is  
8 to say, the standard conditions 1 through 13, as well as the  
9 standard mandatory conditions.

10 In addition, I will require that he participate in a  
11 program to determine whether he has reverted to using drugs or  
12 alcohol; that he be made to participate in a program, a mental  
13 health program; and that he shall continue to take any  
14 prescribed medications unless instructed to by the healthcare  
15 provider; that he submit his person and residence to -- his  
16 premises to a search by the probation office, if the probation  
17 officer has reasonable belief that contraband or evidence of a  
18 violation of the conditions of release may be found; and that  
19 he report to the nearest probation office within 72 hours of  
20 release from custody.

21 I should also note that the reason for the substantial  
22 variance from the guidelines is also because he will be away  
23 from his family if, as everyone expects, he is designated to  
24 either Devons or Butner or some other similar facility. And I  
25 am familiar with those facilities, and know that they will be

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1 able to provide Mr. Burden with the medical treatment that he  
2 requires during the balance of his incarceration.

3 Does counsel know of any legal reason, other than what  
4 has already been stated, that the sentence should not be  
5 imposed as stated.

6 MR. BAUER: No, your Honor.

7 MR. GINSBERG: No, your Honor.

8 THE COURT: Very well, then.

9 Mr. Burden, it is the judgment of the Court that you  
10 be committed for 48 months on the count of conviction. That  
11 will be followed by three years of supervised release. I also  
12 order you to pay a special assessment in the amount of \$100,  
13 which shall be due immediately. I will not impose a fine, as I  
14 find that you are not able to pay a fine.

15 I take it the government is not seeking forfeiture?

16 MR. BAUER: No, your Honor.

17 THE COURT: Are there any open counts?

18 MR. BAUER: There are, your Honor.

19 Mr. Burden pled guilty to the S-2 Information. The  
20 government moves to dismiss the counts in the underlying  
21 indictment, as well as the S-1 indictment.

22 THE COURT: That application is granted.

23 Mr. Burden, because of your plea agreement with the  
24 government, I understand that your appellate rights are fairly  
25 limited. But, Mr. Ginsberg, will you assure me, and Mr.

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1 Moskowitz, will you assure me that you will speak with  
2 Mr. Burden about the sentencing, the appellate rights that he  
3 has, such as they may be, and that he do so as soon as  
4 possible.

5 MR. GINSBERG: We will, your Honor.

6 THE COURT: Are there any other applications, Mr.  
7 Ginsberg?

8 MR. GINSBERG: Yeah. I think that, before we leave,  
9 your Honor, we need to make sure, however, that he needs to  
10 be -- that, your Honor, if you can, if you have the authority  
11 at this point, order that Mr. Burden be taken back to Bellevue  
12 Hospital, which I believe is consistent with my understanding  
13 of what Adam Johnson, who is the head of the Legal Department  
14 at the MCC wants. And I believe it was also consistent with my  
15 understanding of what the marshals wanted. Because they don't  
16 want to have to deal with the medical situation back in the MCC  
17 and retransport him to Bellevue.

18 So if that can be accomplished, or it needs some  
19 writing to be accomplished before he leaves the building, so  
20 that they can take him directly there. Whatever needs to be  
21 done, I would appreciate that that be taken care of.

22 MR. MOSKOWITZ: If I just might add a little bit to  
23 that. The goal here, as I understood it in my conversations  
24 with Mr. Bauer and communications with Mr. Johnson, is that if  
25 Mr. Burden goes back to Bellevue, as I think all of the parties

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1 had anticipated, he will have the surgery within the next week  
2 or so, at the latest, and whatever time that he will require to  
3 recuperate. It is our hope that the government, working with  
4 the Bureau of Prisons, will be able to accomplish the  
5 designation to a medical facility in an expedited fashion, so  
6 by the time he is ready to be released from Bellevue, post op,  
7 he will be able to go directly to the medical facility so that  
8 we won't have a repeat of any of the problems at the MCC. And  
9 I think the MCC really does not want him back. I know he  
10 doesn't want to go back. And I think it would be best for all  
11 concerned if we can accomplish that with your Honor's help.

12 THE COURT: Well, it sounds like that is what everyone  
13 wants to happen. And I don't know that -- first of all, I  
14 don't know that an order is required, since that is what the  
15 MCC wants to do.

16 Secondly, I don't know that an order would be  
17 appropriate, since he will be in their custody.

18 Moreover, in connection with a situation like this, I  
19 am very reluctant to enter an order affecting the medical  
20 treatment that someone is getting, or should be getting, as I  
21 have no insight in that regard, and I could be ordering  
22 something that is contraindicated.

23 MR. GINSBERG: I'm not asking for medical treatment.  
24 Maybe I should have put it a different way. Just as if I would  
25 be asking your Honor, in a different situation, to recommend a

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1 facility of placement, I would recommend -- I would ask your  
2 Honor to recommend that Mr. Burden be taken back to Bellevue  
3 Hospital, and then allow the process to go forward from there.

4 THE COURT: I'm happy to make that recommendation.  
5 And I'm happy to do that. I know members of the marshal  
6 service are here.

7 Is there any particular recommendation or direction  
8 that you need, from me, in order to have Mr. Burden taken back  
9 to the hospital.

10 THE MARSHAL: I don't think so, your Honor. Because  
11 they brought him from the hospital, here, so they are going to  
12 bring him right back, I understand. Probably, as I understand  
13 it, he has to go back for the surgery.

14 THE COURT: Very well.

15 THE MARSHAL: I would think they are waiting on us to  
16 bring him back to the MCC or back to Bellevue, probably have  
17 transport teams waiting for us to bring him back.

18 MR. BAUER: That's all consistent with my  
19 conversations with Jim Kahn, who is in charge of the inmate  
20 movement here for the marshals. And what I'll say is that  
21 we'll also move expeditiously to have his designation be made.

22 And so I'll renew what I asked earlier, which would be  
23 if your Honor can enter the judgment as soon as possible.

24 THE COURT: Yeah, we'll try to do that today --

25 MR. BAUER: Okay.

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1                   THE COURT: -- okay, and --

2                   MR. BAUER: And if you could put in that judgment,  
3 I'll make the application that I'm sure they were going to,  
4 asking you make that recommendation that he be designated to a  
5 medical facility appropriate for his condition, such as --  
6 however you want to say it -- such as Butner or Devons.

7                   THE COURT: Very well. I'll make that recommendation.

8                   THE DEFENDANT: Thank you, your Honor.

9                   THE COURT: Anything further?

10                  MR. BAUER: Not from the government, your Honor.

11                  MR. GINSBERG: Thank you very much for your  
12 consideration, your Honor.

13                  THE COURT: In that event, we're adjourned.

14                  Mr. Burden, good luck to you, sir.

15                  THE DEPUTY CLERK: All rise.

16                  (Adjourned)

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